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14 UNIT OF VOLKSWAGEN GROUP OF AMERICA, INC.

15 STATE OF CALIFORNIA
16
17 NEW MOTOR VEHICLE BOARD

18 In the Matter of the Protest of

Protest No.: PR-2581-18

19 MAVERICK AUTO GROUP 2, LLC, a
20 California Limited Liability Company,

21 Protestant,

22 v.

23 VOLKSWAGEN GROUP OF AMERICA,
24 INC., a New Jersey Corporation,

25 Respondent.

**RESPONDENT VOLKSWAGEN
OF AMERICA, INC., AN
OPERATING UNIT OF
VOLKSWAGEN GROUP OF
AMERICA, INC.'S REPLY IN
SUPPORT OF MOTION TO
DISMISS PROTEST**

I. INTRODUCTION

Protestant has failed to present a single piece of evidence to contest that good cause exists to terminate Protestant or to contest that the California New Motor Vehicle Board (“Board”) has the authority to summarily dismiss the Protest. Protestant has not offered and cannot offer any evidence to refute that it (i) closed its Volkswagen dealership and ceased selling and servicing Volkswagen vehicles in November 2018 and has been closed since that time, (ii) lost its line of wholesale financing and has no ability to purchase new vehicles, (iii) does not have a valid new motor vehicle dealer occupational license from the California Department of Motor Vehicles (“DMV”), (iv) does not have any remaining new vehicle inventory, (v) currently is not selling or servicing Volkswagen vehicles or otherwise serving the public in Fairfield, California, and, finally, (vi) does not have *any* viable plans to re-open or resume operations of the Volkswagen dealership at its authorized location.

Protestant’s motive is clear – this Protest is merely a delay tactic, and Protestant implores the Board to deny Respondent Volkswagen of America, Inc.’s, an operating unit of Volkswagen Group of America, Inc. (“VWoA”) Motion to Dismiss in order to protect Mr. Hassanally’s investment and allow Protestant an indefinite amount of time to attempt to sell its Volkswagen dealership (an admission that Protestant, itself, has no plans to re-open or resume operations). Contrary to Protestant’s assertion, permitting the Protest to continue will not protect Protestant’s investment in the Volkswagen dealership, as Mr. Hassanally is the one who unilaterally and voluntarily decided to close the Volkswagen dealership in November 2018, nearly four months ago. There is no dispute that Protestant has gone out of business, and there is no relief the Board could grant – whether at this stage or after a full merits hearing – which could result in Protestant resuming operations. Therefore, for the reasons set forth below and in its moving brief, VWoA requests that the Board dismiss the Protest with prejudice.

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1 **II. THE UNDISPUTED RECORD ESTABLISHES THAT GOOD CAUSE EXISTS**
2 **TO TERMINATE PROTESTANT AND A MERITS HEARING ON THE**
3 **PROTEST WOULD BE FUTILE**

4 **A. Protestant Has Failed to Proffer Any Credible Evidence to Refute that Good**
5 **Cause Exists to Terminate Protestant**

6 Protestant does not dispute any of the following facts, all of which collectively establish
7 that there is good cause to terminate Protestant as a matter of law:

- 8 • Protestant closed the doors at its Volkswagen dealership on November 16, 2018
- 9 • Protestant placed a sign on the doors of its Volkswagen dealership that indicated
10 that Protestant was “CLOSED” and “OUT OF BUSINESS”
- 11 • Protestant ceased its sales operations in November 2018
- 12 • Protestant ceased its service operations in November 2018
- 13 • VWoA issued a Notice of Termination Due to Cessation of Business Operations
14 (“Notice of Termination”) to Protestant on or about November 29, 2018, which
15 Protestant received on or about November 30, 2018
- 16 • Protestant’s Volkswagen dealership was closed for more than seven (7)
17 consecutive days prior to VWoA issuing a Notice of Termination to Protestant
- 18 • The Notice of Termination complied with the requirements of section 3060 of the
19 California Vehicle Code
- 20 • Protestant lost its line of wholesale financing in November 2018 and has not
21 restored or replaced the line of wholesale financing
- 22 • Protestant remains without wholesale financing to this day
- Protestant’s occupational license as a new motor vehicle dealer in California is
“not valid”¹
- BMO Harris Bank, N.A. (“BMO”), the secured lender who formerly provided
Protestant’s line of wholesale financing, has filed a lawsuit against Protestant,
seeking to recover more than \$16 million

23 ¹ Protestant purports to contest the admissibility of the printout from the DMV’s website, which
24 shows that Protestant’s occupational license as a new motor vehicle dealer is “not valid,” and
25 which is attached as Exhibit H to the Declaration of Richard H. Otera. VWoA requests that the
26 Board take judicial notice of Exhibit H. Section 452(h) of the California Evidence Code
27 provides that judicial notice may be taken of “[f]acts and propositions that are not reasonably
28 subject to dispute and are capable of immediate and accurate determination by resort to sources
of reasonably indisputable accuracy.” Cal. Evid. Code § 452(h). Because the occupational
license status of Protestant as a new motor vehicle dealer is a fact that is not reasonably subject
to dispute (indeed, Protestant does not contest the fact or submit any evidence to contradict that
its license is “not valid”) and is capable of immediate and accurate determination by resort to
sources of reasonably indisputable accuracy (one can simply visit the California DMV website
available at <https://www.dmv.ca.gov/portal/dmv/detail/portal/oling2/welcome>), it is proper for
the Board to take judicial notice of this document.

- BMO has foreclosed on certain of its collateral interests, including on the new vehicle inventory that was present at Protestant's Volkswagen dealership at the time of the dealership's closure and for which BMO had formerly provided the wholesale financing
- Protestant is not conducting an adequate amount of business, or any business at all, in Fairfield, California, and has not done so since closing the dealership in November 2018
- Protestant is not conducting any sales business in Fairfield, California
- Protestant has not had any employees in its Sales Department since November 2018
- The last time that Protestant ordered a new Volkswagen vehicle from VWoA was on October 10, 2018
- Protestant's last sale of a new Volkswagen vehicle was reported sold to VWoA on October 30, 2018
- Protestant has no remaining new vehicle inventory
- Protestant is not conducting any service business in Fairfield, California
- Protestant has not had any employees in its Service Department since November 2018
- The last time that Protestant submitted a part order to VWoA was on November 2, 2018
- The last warranty repair completed on a Volkswagen vehicle by Protestant was on November 9, 2018
- Protestant submitted its last warranty claim to VWoA on November 12, 2018
- Protestant did not construct a White Frame facility, despite its agreement to do so
- Rahim Hassanally (sole member of Protestant) and/or Momentum Auto Group (an affiliate of Protestant) sold the real property upon which Protestant's Volkswagen dealership is located to an unaffiliated real estate investment trust ("REIT"), Pontus REIT
- The REIT has not received any rent from Protestant or its affiliated dealerships since their closure and has threatened to commence eviction proceedings against Protestant and its affiliated dealerships
- Protestant now has been closed for more than 115 days and has never re-opened once since its closure in November 2018
- Protestant has not taken any steps to re-open the Volkswagen dealership in Fairfield, California since its closure in November 2018 and has no intention to re-open the Volkswagen dealership in Protestant's name

1 See Declaration of Sal Mazzara dated February 1, 2019 and Declaration of Richard H. Otera
2 dated February 4, 2019 and exhibits attached thereto. The undisputed facts clearly establish that
3 Protestant has failed to comply with material obligations under its Volkswagen Dealer
4 Agreement, including but not limited to, by losing its line of wholesale financing, by closing its
5 doors and failing to provide any sales or service business, by failing to safeguard and promote
6 the reputation of Volkswagen products and VWoA, and by failing to promote and sell
7 Volkswagen products. As such, summary termination of Protestant's Dealer Agreement is both
8 proper and just.

9 Recognizing that it has no basis to challenge any of the twenty-eight (28) undisputed
10 facts identified above, Protestant instead offers two specious "facts" as to why good cause for
11 termination supposedly does not exist: (a) Mr. Hassanally's purported investment of \$4 million
12 in Protestant, and (b) the contention of Mr. Issa, who has not yet been appointed by the court as
13 the receiver of Protestant, that there have been discussions with an unnamed individual about the
14 potential purchase of the Volkswagen dealership. However, Mr. Hassanally's investment is
15 unsubstantiated by any verifiable evidence. Protestant did not submit any documents or other
16 proof regarding of the amount of Mr. Hassanally's investments, which according to Mr.
17 Hassanally, includes the real property that he had already sold to a REIT in or around 2016.
18 Protestant further failed to submit any evidence that any investments previously made by Mr.
19 Hassanally remain in place and have not been spent, foreclosed upon, or otherwise available to
20 Protestant at this time, a critical omission given the multiple secured and unsecured creditors
21 pursuing Mr. Hassanally for unpaid debts.

22 In addition, the purported of sale of Protestant to a potential purchaser is uncertain and
23 speculative at best. Not only does Protestant acknowledge that Mr. Issa has not yet been
24 appointed the receiver of Protestant² and therefore has no authority to broker the sale of
25

26 ² Marc Spizzirri contacted in-house counsel for VWoA on or about February 28, 2019 and
27 informed in-house counsel for VWoA that he is "working as receiver on the Momentum VW
28 dealership in Fairfield, California" and asked to discuss VWoA's "pending motion to terminate
the dealership." VWoA is not aware of any court order appointing Mr. Spizzirri (or anyone
else) as receiver for Protestant and Protestant did not indicate anywhere in its Opposition to
VWoA's Motion to Dismiss that Mr. Spizzirri has been appointed receiver of Protestant.

1 Protestant, but Protestant also admits that the terms of the supposed sale have not yet been
2 “reduced to writing,” and has not otherwise put forth any evidence of a purchase agreement,
3 letter of intent, or any other documentation regarding the potential sale of Protestant. More
4 importantly, however, the facts offered by Protestant do nothing to meaningfully contest the
5 litany of undisputed facts offered by VWoA showing that good cause exists to terminate
6 Protestant. Protestant does not contest that it has closed its doors and ceased all operations at its
7 Volkswagen dealership, ceased serving the public in Fairfield, has not re-opened its Volkswagen
8 dealership, and has no viable plans to re-open its Volkswagen dealership in Protestant’s name.

9 As explained in VWoA’s moving brief, the undisputed facts presented by VWoA
10 conclusively establish that (i) Protestant is not conducting an adequate amount of business, or
11 any business at all, as compared to the business available to Protestant; (ii) Protestant has not
12 made the investment or incurred the obligations necessary to perform its part of the Volkswagen
13 franchise; (iii) to the extent that Protestant has made an investment, the investment was not
14 permanent; (iv) it would not be injurious to the public if Protestant is replaced, as its Volkswagen
15 dealership has been closed for nearly four months; (v) Protestant does not have adequate motor
16 vehicle sales and service facilities, equipment, vehicle parts, or qualified service personnel to
17 reasonably provide for the needs of the consumers and is not rendering adequate or any services
18 to the public; (vi) Protestant has failed to fulfill the warranty obligations of VWoA to be
19 performed by Protestant; (vii) Protestant has failed to comply with the terms of the Volkswagen
20 Dealer Agreement; (viii) Protestant has remained closed for business for nearly four months with
21 zero indication that it can re-open due to its insurmountable debt and involvement in litigation by
22 secured creditors. Thus, dismissal of the Protest is warranted.

23 **B. There Is No Reason or Need for the Board to Conduct a Full Merits Hearing**
24 **Because No Evidence Can Be Developed Between Now and a Hearing That**
25 **Would Change The Fact That Protestant Closed for Business for More Than**
Seven Days, Remains Closed to This Day, and Has No Realistic Plans to Re-
Open Its Volkswagen Dealership

26 Overlooking the holdings in *Duarte & Witting, Inc. v. New Motor Vehicle Bd.* (2002) 104
27 Cal.App.4th 626 and *In the Matter of the Protests of Porter Auto Group, L.P. v. FCA US LLC*,
28 Protestant contends in its Opposition that “discovery should proceed,” that “a protest may only

1 be overruled after consideration of all relevant evidence,” and that the “Board should consider
2 the evidence that is developed at a hearing to determine whether [VWoA] has established good
3 cause to terminate.” Opp. at p. 5. Protestant is wrong. Where, as here, the indisputable facts
4 show good cause for termination as a matter of law and that the dealer has no viable basis for
5 refuting that there is good cause, there is no point to conducting an evidentiary hearing on issues
6 of whether the dealer was performing its obligations under the dealer agreement or adequately
7 providing for the needs of the public, and dismissal of the Protest is warranted. *See Duarte*, 104
8 Cal.App.4th at 637, 641.

9 Moreover, there is no reason for an evidentiary hearing because there is no amount of
10 time needed for the parties to develop additional facts and put forth additional evidence in order
11 for the Board to determine whether good cause for termination exists. No new facts can or will
12 be established by Protestant. Protestant’s Opposition was its opportunity to refute that there is
13 good cause for termination, and Protestant submitted nothing of consequence. All that Protestant
14 has offered is that Mr. Hassanally purportedly invested \$4 million in Protestant, and that Mr.
15 Issa, who has not yet been appointed by the court as the receiver of Protestant and has no
16 authority to broker a sale of Protestant, has had discussions with an unverified individual about
17 the potential purchase of Protestant. And contrary to Protestant’s presumption, the question here
18 is not whether a wholly unrelated third-party may at some point, and only if approved by VWoA,
19 be able to open a new Volkswagen dealership in Fairfield, California. The pertinent question,
20 rather, is whether Protestant, *i.e.*, Maverick Auto Group 2, LLC, has any viable plans to re-open
21 its Volkswagen dealership in Fairfield, California. And the answer to that question is a
22 resounding “no.”

23 Finally, even if Protestant submitted actual evidence of a buy-sell – which it has not – the
24 entire premise of a buy-sell or a potential buy-sell is that the dealership will end up being opened
25 by an entirely different operator. Not only is the approval of a buy-sell outside of the relief that
26 the Board can provide to Protestant, but Protestant’s reliance on the prospect of a buy-sell is an
27 admission by Protestant that Protestant cannot operate the Volkswagen dealership and has no
28

1 realistic plans to re-open its Volkswagen dealership at its authorized location in Fairfield,
2 California. Protestant in effect has conceded that a merits hearing on the Protest would be futile.

3 No matter how much time passes, how much discovery is conducted, or whether the
4 Board permits the Protest to go to hearing, Protestant will never be able to conjure evidence to
5 refute that it (i) closed its Volkswagen dealership in November 2018, (ii) lost its line of
6 wholesale financing in November 2018, (iii) ceased selling and servicing Volkswagen vehicles
7 in November 2018, (iv) does not have a valid new motor vehicle dealer occupational license
8 from the DMV, (v) does not have any remaining new vehicle inventory; (vi) currently is not
9 selling or servicing Volkswagen vehicles or otherwise serving the public in Fairfield, California,
10 and (vii) does not have viable plans to re-open or resume operations of the Volkswagen
11 dealership at its authorized location. The fact remains that no order of the Board could result in
12 Protestant resuming operations as a Volkswagen dealership. Permitting the Protest to continue
13 and allowing Protestant an indefinite amount of time to attempt to sell its Volkswagen dealership
14 (all while the public continues to suffer harm), would render meaningless the statutory scheme
15 permitting termination of a dealership following its closure for seven consecutive days.
16 Consequently, a hearing on the Protest would be futile and a waste of the Board's resources, and
17 summary dismissal of the Protest is appropriate.

18 **C. *Powerhouse Motorsports Group, Inc. v. Yamaha Motor Corporation Is***
19 ***Inapposite and Protestant's Reliance on it Is Misplaced***

20 In its Opposition, Protestant contends that *Powerhouse Motor Sports Group, Inc. v.*
21 *Yamaha Motor Corporation* (2013) 221 Cal.App.4th 867 stands for the proposition that "a dealer
22 not in operation continues to enjoy the protections of the Vehicle Code" and the "closure of the
23 dealership is not an event that as a matter of law precludes consideration of evidence going to the
24 good cause factors." Opp. at p. 4. Protestant's interpretation of *Powerhouse* is misguided, as
25 *Powerhouse* is clearly distinguishable from the instant case for several reasons.

26 *First, Powerhouse* is a decision by the California Court of Appeal, not the Board, and the
27 issue presented on appeal in that case was not whether the Board has the authority to summarily
28 dismiss a protest without a full merits hearing where good cause for termination has been

1 established. Rather, the issue before the Court of Appeal in *Powerhouse* was whether the
2 Board's decision terminating the dealer's dealer agreement based on the untimeliness of the
3 dealer's protest precluded the dealer from bringing a civil action in state court asserting statutory
4 and common law claims.

5 *Second*, the dealer in *Powerhouse* had filed a civil action against the manufacturer in state
6 court and sought damages in connection with the dealer's causes of action for violation of
7 section 11713.3 of the California Vehicle Code, intentional interference with contractual
8 relations, intentional interference with prospective business advantage, and breach of contract
9 and the covenant of good faith. Here, in contrast, Protestant has filed a protest with the Board
10 and has not asserted any claims for damages, as the Board does not have the authority to award
11 damages. *See Hardin Oldsmobile v. New Motor Vehicle Bd.* (1997) 52 Cal.App.4th 585, 595
12 ("Furthermore, there is no statutory authority for the Board to award damages"); *Duarte*, 104
13 Cal.App.4th at 638 (citing *Hardin*, 52 Cal.App.4th 595).

14 *Third*, *Powerhouse* and the instant matter are factually dissimilar. In *Powerhouse*, the
15 plaintiff-dealer had executed a formal agreement for the sale of the dealership to the purchaser
16 prior to the manufacturer issuing a Notice of Termination to the dealer. Here, as Protestant
17 admits, there is no formal agreement for the sale of Protestant's Volkswagen dealership and the
18 potential buy-sell is highly uncertain. And even if Protestant does eventually execute a formal
19 agreement for the sale of its Volkswagen dealership after some indefinite amount of time –
20 which it has not – VWoA issued the Notice of Termination to Protestant over 115 days ago, well
21 in advance of any speculative sale of Protestant's Volkswagen dealership. Accordingly, even if a
22 buy-sell is signed, the proposed buyer could not purchase a going concern or anything even
23 close. Protestant has not only been closed for months – a period of time far exceeding the seven
24 (7) consecutive days stated in Vehicle Code Section 3060, authorizing termination – but it also
25 has no new vehicle inventory, has a multitude of creditors which it cannot satisfy, and faces the
26 threat of eviction from the dealership premises. All that Protestant currently has to sell, if
27 anything, is a dealership subject to an incurable and irrefutable notice of termination.
28

1 *Fourth and finally*, in the underlying Board action in *Powerhouse*, the manufacturer had
2 moved to dismiss the protest on the grounds that the protest was untimely, and therefore the
3 parties did not submit evidence and Board had no occasion to evaluate whether the undisputed
4 facts established that good cause for termination of the dealer existed.

5 Put simply, *Powerhouse* has no application here and does not prevent the Board from
6 dismissing the Protest when VWoA has submitted evidence establishing that good cause exists
7 for terminating Protestant.

8 **III. CONCLUSION**

9 As demonstrated above and in VWoA's moving brief, the indisputable facts demonstrate
10 that good cause for termination exists as a matter of law and that Protestant has not refuted and
11 cannot refute that there is good cause for termination. The indisputable facts are such that there
12 is no relief available before the Board, and consequently, going to a merits hearing to determine
13 whether there is good cause to terminate the franchise would be an exercise in futility and a
14 waste of public funds and the Board's resources. For these reasons, VWoA respectfully requests
15 that the Board dismiss the Protest with prejudice.

16 Dated: March 13, 2019

Respectfully submitted,

18 NELSON MULLINS RILEY & SCARBOROUGH LLP

19 By:


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22 Attorneys for Respondent
23 VOLKSWAGEN OF AMERICA, INC., AN
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25 AMERICA, INC.
26
27
28

PROOF OF SERVICE

I, Emi Wakiya, declare as follows:

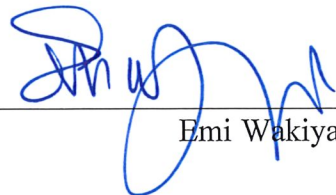
I am employed in Los Angeles County, Los Angeles, California. I am over the age of eighteen years and not a party to this action. My business address is 19191 South Vermont Ave., Suite 900, Torrance, California 90502. On **March 13, 2019**, I served the within:

**RESPONDENT VOLKSWAGEN OF AMERICA, INC., AN OPERATING UNIT
OF VOLKSWAGEN GROUP OF AMERICA, INC.'S REPLY IN SUPPORT OF
MOTION TO DISMISS PROTEST**

on the interested parties in this action addressed as follows: **SEE ATTACHED SERVICE LIST**

- ☒ **(BY MAIL)** By placing such document(s) in a sealed envelope, with postage thereon fully prepaid for first class mail, for collection and mailing at Nelson Mullins Riley & Scarborough LLP following ordinary business practice. I am readily familiar with the practice at Nelson Mullins Riley & Scarborough LLP for collection and processing of correspondence for mailing with the United States Postal Service, said practice being that in the ordinary course of business, correspondence is deposited in the United States Postal Service the same day as it is placed for collection.
- ☐ **(BY OVERNIGHT MAIL)** By placing such document(s) in a sealed envelope, for collection and overnight mailing at Nelson Mullins Riley & Scarborough LLP following ordinary business practice. I am readily familiar with the practice at Nelson Mullins Riley & Scarborough LLP for collection and processing of overnight service mailing, said practice being that in the ordinary course of business, correspondence is deposited with the overnight messenger service, Federal Express, for delivery as addressed.
- ☐ **(BY PERSONAL SERVICE)** By causing such document(s) to be delivered by hand, as addressed by delivering same to First Legal Services with instructions that it be personally served.
- ☒ **(BY ELECTRONIC MAIL)** By transmitting such document(s) electronically from my e-mail address, emi.wakiya@nelsonmillins.com at Nelson Mullins Riley & Scarborough LLP, to the person(s) at the electronic mail addresses listed above.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on **March 13, 2019**, at Torrance, California.


Emi Wakiya

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